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Supreme Court of the United States

OCTOBER TERM 1973

No. 73-1832

ALPHONSE CIRILLO and VINCENT MURPHY,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM — 1973

NO.

ALPHONSE CIRILLO and VINCENT MURPHY,
Petitioners

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Alphonse Cirillo and Vincent Murphy, pray that a writ of certiorari issue to review a final judgment and order of the United States Court of Appeals, Second Circuit, entered May 7, 1974 (Exhibit A *infra*) which affirmed the judgment of the United States District Court, Eastern District of New York (Honorable Orrin G. Judd), entered July 30, 1973, as to the petitioner Alphonse Cirillo and the judgment entered September 10, 1973 as to the petitioner Vincent Murphy, whereby the said petitioners were convicted as follows:

Both petitioners were found guilty of conspiracy to distribute heroin in violation of 21 U.S.C. 846; both petitioners were convicted of possession with intent to distribute one kilogram of heroin (count 1); both petitioners were convicted of distribution of the identical quantity of heroin involved in count 1 (count 2); both petitioners were convicted of attempting to distribute 1/2 kilogram of heroin (count 7).On July 30, 1973 the petitioner, Alphonse Cirillo was sentenced to 14 years, 9 months imprisonment and 10 years special parole on counts 1 and 2; 10 years imprisonment to be served consecutively to the aforementioned term, and 10 years special parole on counts 7 and 9. Cirillo was also fined the sum of $10,000 on count 1 and $10,000 on count 9. On October 12, 1973 Murphy was sentenced to concurrent terms of 10 years imprisonment and 7 years special parole and a $5,000 fine on count 9.

THE OPINION OF THE COURT BELOW:

The opinion and decision of the United States District Court, Eastern District of New York, denying a motion made by the petitioners to suppress the evidence on the grounds of illegal wire tapping, is set forth below (Appendix B, *infra*). Such opinion is not otherwise reported.

The opinion of the United States Court of Appeals is also set forth in Appendix A as aforesaid. Such opinion is not otherwise reported as yet.

JURISDICTION:

The order and judgment of the United States Court of

Appeals for the Second Circuit is dated May 7, 1974. Jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1254(1).

QUESTIONS INVOLVED:

(A) Were the New York State wire tap warrants or orders valid where the first of successive warrants failed to provide and direct that the authorities minimize the electronic eavesdropping to be conducted thereunder?

(B) Did the petitioners receive a fair hearing on a motion to suppress the evidence where the trial court denied the motion without affording the petitioners an evidentiary hearing as to the issue of minimization?

(C) Was and is 18 U.S.C. 2510 et. seq. or Title III of the Omnibus Crime Control and Safe Street Acts constitutional under the 1st, 4th, 5th, 9th and 14th Amendments to the Federal Constitution also bringing for review the constitutionality of the New York State statutes authorizing electronic surveillance, such statutes being found in 11A McKinney's Consolidated Laws of New York Annotated, Sections 700.05 of the Criminal Procedure Law of the State of New York?

CONSTITUTIONAL AND PRINCIPAL STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

"Searches and Seizures: The right of the people to be secure in their persons, houses, papers and effects, against

unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT V:

". . . , nor be deprived of life, liberty or property without due process of law; . . .

AMENDMENT IX:

"The enumeration under the constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

AMENDMENT XIV, SEC. I

". . .; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

47 U.S.C. 605 (Federal Communications Act)

"Unauthorized publication of communications. — Except as authorized by Chapter 119, Title 18, U.S.C. Code (18 U.S.C. Sections 2510-2520) no person receiving, assisting or receiving transmitting or receiving and transmitting any interstate . . . communication by wire . . . shall divulge or publish the existence, contents, . . . thereof, . . ."

18 U.S.C. 2515

"Prohibition of Use as Evidence of Intercepted Wire or Oral Communications. — Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence at any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter . . ."

18 U.S.C. 2516

"Authorization for Interception of Wire or Oral Communications. —

"(2) The principal prosecuting attorney of any state, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that state to make application to a state court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with Section 2518 of this chapter and with the applicable state statute an order authorizing, or approving the interception of wire or oral communications . . ."

18 U.S.C. 2518(5)

". . . Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . ." .

(8)(A)

"Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders . . ."

(10)(A)

"Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that — (i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval."

11A McKINNEY'S CONSOLIDATED LAWS OF NEW YORK, CRIMINAL PROCEDURE LAW, SECTION 700.30:

"An eavesdropping warrant must contain: (7) A provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article, . . ."

STATEMENT OF THE CASE:

The origin of this case is found at a time when the New York City police, the Kings County District Attorney and Federal authorities applied on October 31, 1972 to a judge of the Supreme Court of the State of New York, Appellate Division, Second Department, for the issuance of a wire tap order or warrant, subjecting Cirillo's telephone to electronic surveillance or wire tapping. The application was based on the affidavit of the District Attorney of Kings County, City and State of New York, who relied principally on an affidavit of a police officer named Douglas LeVien, a New York City police officer. The applicants were successful and the order was granted (the order is found in Appendic C, *infra*).

After the time allotted in the order, for surveillance, the authorities succeeded in procuring successive and renewal orders from diverse state Supreme Court judges. The original order of October 31, 1972 was renewed November 29, 1972 and further renewed for the following dates: December 27, 1972, December 29, 1972, January 25, 1973, February 27, 1973, and March 29,

1973 (16-300).*

The first order or warrant of October 31, 1972 while referring to the crimes under investigation and authorizing the interception of conversations relating to narcotics, did not contain any direction to the authorities to minimize the interception (16-19). The renewal warrants contained such direction (70, 111, 147, 173, 223, 248, 273).

As a result of the interceptions, conducted under the respective orders or warrants, the petitioners were arrested March 15, 1973. At the time of the arrest a search and seizure of the heroin was had.

Prior to trial, the petitioners made a motion (Murphy joined in the motion made by Cirillo) in the trial court for the suppression of the evidence (301-339).

Cirillo by his counsel with Murphy's joinder, submitted an extensive affidavit alleging the factual basis for the granting of relief.

It was only when the motion came on to be heard that the United States Attorney first submitted affidavits in support of the opposition to the petitioners' application. The substance of the government's opposition was to the effect that while the initial warrant or order did not contain a direction to the authorities to minimize the interception, in practice minimization was conducted (340, 348, 352, 353).

No evidentiary hearing was conducted by the Court that ultimately denied the motion. As a matter of fact, the motion

*( ) This refers to the pagination of the joint appendix filed in the Court below by the petitioners.

was then and there denied in open Court, the Court adding that a written decision would be filed subsequently. And so after the denial the Court did render a written opinion or decision setting forth the grounds of the denial (Appendix B, *infra*). The Court in its decision acknowledged that the petitioners raised the issues that the first order or warrant did not provide for a direction to the authorities to minimize the interceptions.

The first warrant or order, the seminal warrant, designated Cirillo as a suspect and his telephone number, 212-631-8570, as being the suspect phone used (16, 17). To procure this warrant, the authorities submitted the affidavit of the District Attorney of Kings County, who adopted or ratified an affidavit by a police officer named LeVien who was investigating the case (35-38, 39-67). The police officer's affidavit alleged that on October 6, 1972 a reliable informant related hearsay to Cirillo and his address.

The police officer further related that the informant told him that on October 2, 1972 he met the petitioner Cirillo with a person named Inciarrano and a "John Doe Murphy". The informant characterized Inciarrano as the petitioner's "connection" and Murphy as his partner (41, 42). The day in question, namely, October 6, 1972, the informant went to Cirillo's home where he noticed a telephone described as a "country telephone" and an additional telphone in another part of the house described as a "princess telephone" (42, 43).

The informant's hearsay further related that the purpose of the meeting was the "transcribing" of about 200 kilograms of heroin (44). The "connection" was designated by the informant as a "Cuban Jew" who was mentioned by Cirillo. The reliable and confidential informant would further have it that Cirillo told him that he received large amounts of heroin from the "Cuban Jew" four (4) times a year and that the "Cuban Jew" was in

Florida. Cirillo guaranteed about 20 kilograms of heroin to Inciarrano at $25,000 a kilo (29). The informant's hearsay further continued to the effect that Cirillo told him that a shipment would occur after November 1, 1972 and that it would be received at a motel in New York (45). According to the informant he actually saw a quarter of an ounce of heroin in the premises used for "snorting". The informant also saw Cirillo use a telephone and talk about the sale of heroin over it. Murphy also used the telephone for the same purpose (45, 46).

On October 19, 1972 the informant and Inciarrano went to Cirillo's house where they discussed 200 kilograms of heroin, Cirillo telling them that the "Cuban Jew" went to Florida to arrange for a shipment (53, 54). It developed however that the informant also stated that at the time of this conversation the "Cuban Jew" was allegedly staying in Cirillo's house but that in the future he was going to Florida to arrange for the shipment (54). The informant would further have it that a call from Florida was expected by Cirillo as to the time the shipment would be made (54, 55). Cirillo was said also to have told the reliable and confidential informant that he kept 20 kilos of heroin in his garage. On October 19, 1972 the informant stated he used Cirillo's phone to discuss the sale of narcotics (56). On October 25, 1972 the informant called Inciarrano and discussed cocaine that Cirillo might be interested in. This call emanated from the office of the District Attorney of Kings County; thus, the informant asked Inciarrano as to whether he could call Cirillo and Inciarrano consented. Consequently the informant called Cirillo. That conversation was recorded by the authorities and was set forth in the police officer's affidavit (57-62). The police officer interpreted the conversation as relating to the petitioner's use of cocaine and also referring to the shipment of heroin from Florida (62-64). Parenthetically it is confusing as to why the police officer had to interpret such a conversation when

all he had to do was ask the informant.

Through the product of eavesdropping under the first warrant, which did not contain a direction to minimize, the authorities procured successive warrants (68-70, 109-111, 145-147, 170-173, 221-223, 245-248, 271-273). The authorities in seeking the successive warrants, set forth some of the intercepted conversations procured and seized under each prior warrant, in their respective affidavits submitted in support of each respective application to procure such warrants (74-88, 90-104, 116-136, 153-155, 157-163, 179-192, 195-213, 228-238, 254-264, 279-292). In investigating this case, and conducting electronic surveillance, the authorities finally on December 5, 1972 saw a person they knew as Walter Sorrenson enter a movie on a street in Brooklyn, go to a bar and thereafter leave by automobile. They followed Sorrenson and saw him enter a building at another location in Brooklyn and emerge from that building. It now developed that Walter Sorrenson was designated by the police as the "Cuban Jew". The observations as to Sorrenson further disclosed that he left the building with a woman and went to another location in Brooklyn. The authorities claimed that Sorrenson was listed with the State and Federal authorities and was also known as Benjamin Casal, having a telephone number in Florida, namely 305-864-7124. Prior to these observations of Sorrenson, the police also saw him meet Cirillo in a diner and speak to him. However, the substance of the conversation was unknown to the police (138-141).

In opposing the motion, the government submitted three affidavits verified June 11, 1973, the day before the motion came on to be heard. These were served the day the motion came on to be heard (4, 366-368). The substance of these affidavits were that the Assistant District Attorney of Kings County and the particular United States Attorney knew all about minimization

and directed the authorities to minimize the interceptions under the warrants (343). As part of the opposition a United States Agent named Dovetko submitted his affidavit describing that he was cooperating with the state authorities investigating this case, and that prior to the application for the first wire tap order or warrant the government attorney called his attention to minimization; that the agent thereafter visited the "plant" and saw the police actually minimize the surveillance (345-346).

An analysis of the minimization will be hereinafter set forth by counsel for the petitioners. At trial, a police officer named Garcia testified. He stated that he had occasion to listen to all the tapes in this case (388). He considered himself an expert on interpreting conversations electronically overheard, in regard to narcotic investigations (390). However, when asked whether he was familiar with the term "argot" in relation to narcotics he didn't know the meaning of the word "argot".

Garcia testified that there were 899 wire tap orders executed by the District Attorney's office before. He admitted that he heard conversations of Mrs. Cirillo over the subject telephone and also the conversations engaged in by Cirillo's children (390, 391). These were partial conversations (391).

Garcia further explained that while auditioning he would attach a secondary meaning to common expressions depending upon the context of which such expressions would be used (391, 392). Thus he was asked whether a conversation relating to children going to school could relate to narcotics. He couldn't recall whether Cirillo's children spoke about going to school however (392). Garcia listened for roughly 150 to 200 hours (392).Garcia admitted that this was more than the average time in regard to auditioning (392, 393).

Garcia did state that he did listen to the children when they spoke. But then he added it was only calls that he felt were important that he listened to (393).

However, because Garcia suspected the petitioner Cirillo of dealing in narcotics he placed more importance to what Cirillo said.

Thus, when asked whether he would attach a sinister meaning if he heard Cirillo talking about sending his children to school, the police officer stated that in this case he would attach such a sinister meaning (393, 396). Garcia stated that he didn't listen to the children of Cirillo when he spoke (393).

This witness further admitted that he overheard Cirillo talking over the telephone in regard to the size of clothing his children wore (397). He overheard a co-defendant's wife a Mrs. Sorrentino on the telephone on numerous occasions as well as her children (397, 398). He actually overheard Mrs. Sorrentino say over the telephone that she wore torn clothes (398). However this police officer admitted if her husband, Mr. Sorrentino, spoke about that subject, he would attribute a criminal meaning to those words (398).

In regard to Cirillo's wife, he overheard her speak twenty-five (25) times (399). In regard to Cirillo's children he overheard them talk over ten (10) times. Then Garcia admitted it was probably twenty (20) times and could have been thirty-five (35) to forty (40) times (399, 400).

In regard to Mrs. Sorrentino who was a co-defendant's wife, this police officer overheard her talk over the telephone twenty-five (25) times (399, 400).

REASON FOR GRANTING THE WRIT:

A. The first wire tap order or warrant was defective in that it failed to contain a direction to the authorities to minimize the interception to be conducted thereunder and this failure required the suppression of all products as well as derivative evidence secured thereunder.

In *Geibard v. United States*, 408 U.S. 41 (1972) it was stated on page 446 that:

> "In Title III, Congress enacted a comprehensive scheme for the regulation of wire tapping and electronic surveillance . . . Title III authorizes the interception of private wire and oral communications, but only when law enforcement officials are investigating specific serious crimes and receive prior judicial approval, an approval that may not be given except on compliance with stringent conditions . . . If a wire or oral communication is intercepted in accordance with the provision of Title III, the contents of the communication may be disclosed and used under certain circumstances . . . Except as expressly authorized in Title III, however, all interceptions or wire and oral communications are flatly prohibited . . ."

Concededly, the first order or warrant did not follow the legislative command found in 18 U.S.C. 2518 (5) that such order or warrant contain a direction to minimize. It is suggested, that to validate such an order because the authorities could refer to such limitation elsewhere, is to rationalize what Congress stated must be expressly provided for in the order. For it is further provided in 18 U.S.C. 2518(10)(A)(ii), that the evidence must be suppressed where the order authorizing interception is insufficient on its face.

The order in this case was insufficient on its face and therefore void. It could not be used at all.

In *U.S. v. Giordano,* May 13, 1974, No. 72-1057, 42 U.S. Law Week, 4642, 4649, it was stated by this Court in part that:

> ". . . The words 'unlawfully intercepted' are themselves not limited to constitutional violations, and we think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device. . . ."

In analyzing the legislative history of Title III, it was further stated by this Court that:

> ". . . but the report also states that the section provides for the suppression of evidence directly or indirectly obtained 'in violation of the chapter' and that the provision 'serves to guarantee' that the standards of the new chapter will sharply curtail the unlawful interception of oral and wire communications. . . .", at page 4649.

That minimization is a substantial issue, may be inferred by the fact that this very Court specifically noted that it was not an issue in its opinion found in *U.S. v. Kahn.* ——U.S.—— 39 L.Ed., 225, at page 234, 94 S. Ct. ——, 1974.

Statutes allowing wire tapping it is submitted must be strictly construed and kept within the controls or confines that Congress imposed.

As was stated in *Application of the United States for Relief*, 427 F.2d 639 (Cir.—9th, 1970) at page 643:

". . . The government's entire case rests upon what it believes may be implied from the act, and upon other general principles summarized above."

"Title III of the act is rather extensive, containing ten sections, some quite lengthy. It purports to constitute a comprehensive legislative treatment of the entire problem of wire tapping and electronic surveillance, complete with the extensive introductory congressional findings. The provisions contained in Title III state, in precise terms, what wire tapping and electronic surveillance is prohibited and what is permissible. As to the latter, meticulous provision is made with respect to the necessity and manner of obtaining prior or subsequent judicial approval, the use which may be made of intercepted information, the way in which aggrieved persons may test the validity of the interception, and the collection and transmission to congress each year of information concerning such activity."

"Nor do we find any provisions in the Act or in the history of its enactment which points in the direction of applied authority. Quite the contrary, consideration of the constitutional significance of the legislation, the relevant provisions of the Act, and the legislative history tend to the opposite direction."

". . . If the Act is to survive a constitutional challenge, a question which we do not here reach, it can only do so by giving the Act as limited a construction as is warranted by

the language. The construction which the government would give Title III, however, whereby an important judicial power is not expressly provided for, would be implied, manifest not unlimited but an expansive reading of the act."

On page 644 it was further stated that:

". . . the congressional findings set forth in Section 801 of the Act, at the head of Title III, intent to define with utmost particularity the circumstances and conditions which an interception may be effectuated. This intent is also manifested in the Senate Report referred to above . . ."

"Congress thus acted advisedly when it formulated and enacted the legislation incorporated in Title III. It was fully aware of the physical problems involved in making investigative wire taps, but it was nevertheless determined to enact a carefully circumscribed act . . ."

In *U.S. v. Scott*, 331 F. Supp. 233 (D.C., Dist. of Col., 1971) it was stated on page 246 that:

"Contrary to the contention of the defendants the statute does not require the Order to state how the agents are to minimize receipt of communications 'not otherwise subject to interception'; nor does the Fourth Amendment prescribe such a requirement. It is sufficient for the Order to state the requirement and direct the officer to carry out the mandate of that order. Whether the surveilling agents in this case actually did conduct the intercept 'in such a way as to minimize the interception of communications that are (not) otherwise subject to interception' is a separate question which will be discussed in another

section of this memorandum."

"A basic requirement of 18 U.S.C. 2518 is that a neutral detached authority be interposed between the police department . . . The order of January 24, 1970 in its final paragraph allows for continued judicial supervision and control by that 'neutral and detached authority' during the execution of the order . . ."

In *U.S. v. Scott, supra,* at page 247 there was an acknowledgement by the Government as phrased by the Court. This was as follows:

"As the government has contended 'Title III . . .' was an attempt among other things to structure a limited system of wire surveillance and electronic eavesdropping . . . One of the limiting provisions of the statute is found in U.S.C. 2518(5) . . ."

"This mandate was clearly set forth in the . . . order. It was the opinion of this court that these limiting provisions satisfied the requirements of 4(c) and (5) and thus made the order valid."

Consequently this was a clear holding that the converse, namely that a warrant which does not contain a direction for minimization is void.

Because of the sensitivity involved in wire tapping, and the extreme intrusiveness, all without prior notice of purpose and authority, it would seem that the usual standards applying to search warrants are inapplicable to eavesdrop warrants. It is submitted that the subject matter of the search and seizure

determined the respective standards applicable to the discreet searches and seizures. In other words, the more intrusive the search the more is required of the authorities. As was stated in *Roadin v. Kentucky*, ——U.S.——, 37 L.Ed., 2d 757 (1973) at page 763:

> ". . . the Fourth Amendment proscription against 'unreasonable seizures', applicable to the states . . ., must not be read in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material . . ."

Then on page 764 of 37 L. Ed. 2d it was stated that:

> ". . . seizing a film, then, being exhibited to the general public, presents essentially the same restraints on expression as to the seizure of all books in a book store. Such precipitious action by a police officer, *without the authority of a constitutionally sufficient warrant*, is plainly a form of prior restraint and is in those circumstances unreasonable. . . ." (Emphasis supplied).

Therefore, the first wire tap order in this case was and is void because it was not 'constitutionally sufficient'.

Since the warrant was, it is submitted, completely void on its face, all the wire tap warrants in this case which sprang from it were void because the exclusionary rule infected such successive warrants. In other words the investigation by means of electronic surveillance in this case was void abinitio.

As was held in *U.S. v. Cox*, 462 F.2d 1293 (Cir.-8th, 1972) 1300:

"The touchstone for deciding the minimization issue is that it rests on a statutory command and therefore turns on the intent of Congress in issuing that directive. The constitutional question of the discreteness, required of a wire tap is a separate question . . . Also the fact that the wire tap warrant included a command to 'minimize' is directly attributable to the statutory requirement that the order so specify . . ."

See *U.S. v. Tortorello*, 480 F. 2d 764 (Cir. 2d 1973), Cert. Denied, 414 U.S. 866 (1973), where this Court specifically noticed that the warrants under consideration included a direction in compliance with Section 2518(5) of 18 U.S.C., the statutory mandate for a specific direction in the warrant as to minimization.

See also *U.S. v. Focarile*, 340 F. Supp. 1033 (D.C., Dist. Md., 1972) 1044, 1045, 1046, 1047, Sub nom *U.S. v. Giordano*, 469 F.2d 522, *U.S. v. Giordano, supra.* See also *State v. Siegal*, 13 M.D. App. 444, 285 A. 2d 671 (Court of Special Appeals, Maryland, 1971), at pages 633, 634 where it was stated that:

"We think it is also mandatory that an interception order 'contain a provision that the authorization to intercept shall be executed as soon as practicable,' and a provision that the interception 'shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interceptions' under the Act. The order . . . contains neither of these provisions . . . Even if this statement by the issuing judge is deemed in compliance with the statutory mandate, the actions of the required provision in the order of 6 October tainted the order of 13 October and 5 November because they each

fell on the first order . . . The invalidity of the order of 6 October would render invalid the two renewal orders.

Congress in enacting legislation authorizing electronic surveillance also granted authority to the states to do so, 18 U.S.C. 2516(2). However, while the state statutory system may be more restrictive than the federal, the State Statutes cannot be less restrictive than the federal. See Section 605 of the Federal Communications Act. See, in this respect, *State of New Jersey v. Sidoti*, 116 N.J. *supra*, 70, 280 A. 2d 864, at page 868 where it was stated in part that:

". . . the Omnibus Act imposed minimum standards upon states with respect to the use of electronic surveillance . . . It was explained by the Senate Judiciary Committee that under the Federal Law 'states would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation.' S. Rep. No. 1097, 90th Cong. 2nd Sess. 98 (1968), U.S. Code Cong. & Admin. News p. 2187 . . ."

Section 700.30 of the Criminal Procedure Law of the State of New York, 11A McKinney's Consolidated Laws of New York, mandates that the warrant or order contain the provisions as to minimization.

New York courts have construed the state statute favorably to the petitioners' position.

In *People v. Pieri*, 69 Misc. 2d 1085, 332 N.Y.S. 2d 786, 789 that:

". . . In the opinion of this Court, the eavesdropping

warrant was invalid because of its failure to include the provisions regarding termination required by Section 700.30 subdivision (7) . . ."

In *People v. Holder*, 69 Misc. 2d 863, 331 N.Y.S. 2d 557, the defendants claimed that the wire tap order was void because it failed to contain a direction that the authorities in executing such order, minimize the interception of communications. On page 566 of 331 N.Y.S. 2d it was held that:

"For the reasons hereinafter set forth, the Court concludes that the eavesdropping warrant under discussion is invalid and violative of (the then state statute governing the requirement as to minimization) . . ."

In *Holder* the Court in setting forth the reasons for its holding, stated on page 568 of 331 N.Y.S. 2d:

"The Court concludes that this provision, which the New York statute states 'must' be contained in the order is not merely directory but is mandatory . . ."

In *People v. Kennedy*, 75 Misc. 2d 10, 347 N.Y.S. 2d, 327, the authorities procured successive wire tap orders. The warrant under consideration in that case, failed to contain the direction to minimize. It was stated on page 332 of 347 N.Y.S. 2d that:

"The case before this Court differs from Focarile in that the order in Focarile contained a provision for minimization. The order here does not. Further, this Court is unwilling to subscribe to the principle that the

affidavit shows probable cause to believe that a conspiracy is in progress, minimization should be ignored."

It was further stated on page 333 of 347 N.Y.S. 2d that:

"At the outset here the wire tap order did not comply with either the requirements of the New York State statute or the Federal statute in that it failed to provide for minimization. No evidence was presented to this Court that this failure was the result of inadvertance. Such a failure must result in a suppression of the evidence since this requirement is essential to the protection of the individual in avoiding the general warrant nature of an eavesdropping warrant. The statute was written to avoid the general warrant prescription in Berger v. New York, 388 U.S. 41 . . ."

"The New York statute which was written in accordance with the opinion clearly sets forth that the warrant 'must' contain . . . We disagree with the People's contention that the word 'must' is not a mandate."

The Court below in *U.S. v. Tortorello*, 480 F.2d 764 (1973), Cert. Denied 414 U.S. 866 (1973), stated at page 783:

"All the Todd Associates orders included a provision in compliance with this section. (18 U.S.C. 2518(5)). The question raised here is whether the executing officers took reasonable measures to minimize the interception of the irrelevant communications."

It is therefore submitted that that case is not relevant to the concrete issue presented in this case.

In a contrasting situation, found in *U.S. v. Manfredi,* cited on page 3307 of the Court's decision and opinion below, 488 F.2d 588, 598 (Cir. 2d-1973), it was held that while the warrants under consideration, neither the original or renewal warrant orders, however, contained any directive to this effect. This was not fatal because the affidavits submitted by the authorities to procure the warrants contained "an agreement" to minimize. Then the Court added:

> ". . . In this case we feel free to analogize from U.S. v.Tortorello, 480 F.2d at 781, which, while it apparently did not consider the matter as controlled by state law, held that a New York State judge's authorization order was sufficient to establish probable cause on the basis of the facts alleged in the affidavits. We feel it proper to read both the orders themselves and the minimization language of the supporting affidavits in a 'common sense and realistic fashion' . . ."

It is respectfully submitted that "agreements" by the officials as to what they will do, is not a substitute for a legislative direction that a warrant before it can be executed and indeed even granted by a judge, must contain the directive to minimize. It is not the authorities who seek the warrant that decide the ex parte application but a judge.

Similarly, a deficient state warrant was validated in *U.S. v. Rizzo,* 492 F.2d 443 (Cir.-2d 1974), cited in the opinion below at page 3309. On page 446 the Court below stated:

> "A related claim is that the warrants were invalid on their face because it did not explicitly call for minimization. Such a failure, however, we have stated in U.S. v.

> Manfredi, 488 F.2d 588 . . . at 590, 597-599, is not necessarily fatal . . . Here each affidavit stated that the interception would be 'executed in such a manner as to minimize the possibility of intercepting privileged or non-pertinent conversations.' Moreover, the warrants themselves contain language that nothing shall be construed as authorizing overhearing or interception of any communication 'which appears privileged or unrelated to the aforementioned crimes.' In light of such language the warrant fulfills the requirements of New York law . . ." .

Thus, the holding of Manfredi, supports a holding in a later case involving a New York State warrant that the "agreement" on the part of the police or the District Attorney to minimize, satisfies the requirement that the order itself contain a direction to the authorities to minimize.

The order under consideration in this application found on pages 16-19-34 of the appendix submitted in the Court below. It recites that there was probable cause that the communications concerning the particular crime would be obtained by the interception of messages. It also stated that there was probable cause to believe that the subject instruments would be used in connection with the commission of drug offenses. Then the warrant or order ordered that the authorities could intercept and described the methods of interception. In so doing the state court stated that the authorities were to so eavesdrop over the telephone instrument in regard to the commission of the narcotic offenses.

It is respectfully submitted that the language of the order under consideration nowhere directed the authorities to minimize. The order was merely a recital of what the Court

found to be probable cause in regard to the telephone instruments that were allegedly used in the commission of narcotic offenses. There wasn't even a direction to the authorities that privilege communications were not to be intercepted. Nor was there any claim on the part of the government that there was "any agreement" on the part of the authorities that they would in fact minimize.

The Court below relied on a solitary New York holding involving this issue and reported in *People v. Solomon*, 74 Misc. 2d 926, 346 N.Y.S. 2d 938 (Supreme Court, Kings County, 1973). The rationale of the state court in that case was primarily based on the holdings in *U.S. v. Tortorello, supra*, 480 F.2d 764 and *U.S. v. Poeta*, 455 F.2d 117 (Cir. 2d, 1972;.

As a matter of fact, the holding of the Court below adopted the reasoning in *People v. Solomon*. Consequently, *People v. Solomon* absorbed the holdings of the 2nd Circuit, and the 2nd Circuit absorbed the holdings of the State court.

Apparently, adopting the reasoning in *People v. Solomon*, the Court below held that the requirement as to the direction to minimize in the warrant was at most "talismanic". However, in view of the fact that Congress specifically stated that suppression would follow where the order was insufficient on its face can hardly be called a platitude or a "talisman".

Congress had the full jurisdiction to legislate in this field. Despite the fact that the exclusionary rule may have been fashioned by the Courts rather than by the legislature, nevertheless Congress also had the full power to legislate in this field, and Congress did by enacting a simply worded rule for excluding evidence illegally procured from wire tapping and electronic

surveillance. It is submitted, this was fully recognized in *U.S. v. Giordano, supra.* See also *Weiss v. U.S.*, 308 U.S. 321, 1939.

The holding in that case was that Section 605 as it then existed, of the Federal Communications Act, was so inclusive and complete that the ban on illegal wire tapping extended not only to telephone calls that were interstate but also intrastate.

Consequently, the issue is not what the Courts have done in regard to technical oversights in procuring conventional search warrants, but what Congress has decided.

The holding in Solomon in regard to the requirement of the minimization direction, does not seem to have been followed in other cases in New York. However, that same case later reported in 75 Misc. 2d 847, 348 N.Y.S. 2d, 673 dealt with the question as to whether the authorities in executing the warrant minimized the interception. The defendants contended that the authorities failed to minimize certain conversations and that therefore all the products of the eavesdropping should be suppressed. Instead, the Court in Solomon held to the contrary stating on page 648 of 348 N.Y.S. 2d that:

> "It is the conclusion of this Court that the failure to minimize the interception of the telephonic communications does not require total suppression of all intercepted conversations. All intercepted conversations which are material and relevant to the approximately 130 which have been the subject of this hearing are admissible. Those conversations which are irrelevant and not-pertinent are suppressed. This ruling shall apply to all intercepted conversations to be offered into evidence on the trial."

Thus it can be seen that failure to include the minimization provision is excusable. Then when the authorities actually do not minimize the court performs surgery and segregates the excessive eavesdropping from the original scope of the investigation. One defect leads to another.

As was stated in *Boyd v. U.S.*, 116 U.S. 616, 635:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."

The twin holdings in *Solomon*, lead to consideration of 18 U.S.C. 2518(10)(a) which provide:

> "(iii) the interception was not made in conformity with the order of authorization or approval."

Thus Congress clearly provided for suppression in regard to the execution of the warrant. But according to the cases cited by the Court below, (ii) of that Section is held to be talismanic. The State Court then relaxes the strict requirements of (iii) of that Section.

Nor is *U.S. v. Ventresca*, 380 U.S. 102 (1965) cited by the Court below in point. That case dealt with discrepant affidavits the authorities submitted to procure the conventional search warrant. It was held that the affidavits were sufficient despite certain errors contained therein. The Court explained that due to the necessities entailed in procuring search warrants affidavits would be considered in a realistic and non-technical manner

thereby encouraging the authorities to procure search warrants. However, in this case, it cannot be said that a judge's order was prepared hastily and must be considered in a "common-sense" fashion. In a "common-sense" manner and viewed realistically, Congress and the New York State legislation drew the order and warrant leaving the issue of probable cause and the other requirements for the objective consideration by a judge. But it is the warrant issuing judge who grants relief and the relief authorizing electronic surveillance, must be confined to the attendant conditions in the case which include an express direction to minimize. See also 41 U.S.C. 605 providing that there be no wire tapping except as authorized by Congress. The order, because it omitted this vital direction, was void and the authorities actually wire tapped without an order.

Additionally, courts which are more proximate to the numerous problems arising from searches and seizures have become somewhat sensitive to discrepancies in the affidavits underlying the warrants. See *U.S. v. Thomas,* 489 F.2d 664 (Cir.-5th, 1973), where it was held that if the police officer makes a material misrepresentation in an affidavit submitted to procure a search warrant, or the misrepresentation is intentional, the warrant will be deemed void. See page 668 of that opinion. In other words, it was held that the purposes of the exclusionary rule, have to be referred to in determining misrepresentations and factual deficiencies in applications for search warrants.

More so, it is urged, where the legislature has enacted a rule of suppression as in the case of electronic surveillance.

The Court below buttressed its holding that discrepancies will not vitiate a successful search and seizure relied on the holding

of this Court in Smith v. United States, 360 U.S. 1, (1959). That case dealt with the propriety of prosecuting a serious crime by way of a prosecutor's information rather than an indictment which the defendants in that case waived. In holding that the waiver was ineffectual, this Court stated on page 9 that while convictions are not to be reversed because of "technical deficiencies which did not prejudice the accused", nevertheless held that:

> ". . . but the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules. . . ."

In this case the seriousness of the charges and the consequential terms of imprisonment, certainly demand strict compliance by the prosecution with the legislative enactment in question.

As held in *Sgro v. United states*, 287 U.S. 206, 210, search warrants are "drastic".

Nor is the holding of the New York State Court of Appeals, *People v. Glen*, 20 N.Y. 2d 252, Cert. Denied sub nom *Baker v. New York*, 409 U.S. 849 (1972) supporting authority for the decision below, see pages 3308-3309 of the slip opinion, appendix A herein. That case dealt with the propriety of a state court issuing the search warrant to seize property that may not have been in existence or at the locale subject to the warrant at the time of the issuance of the search warrant. The Court of Appeals of the State of New York held that the warrant could only be executed within a ten-day limitation; that the property to be seized was seized within the limitations.

It was further held in that opinion that technical defects of a warrant does not undo a search. However, the full holding in that respect found on pages 261 and 262 of the opinion states:

> "A subordinate issue merely alluded to by the parties is whether the possibility that the warrants by their terms could have been executed prematurely . . . renders the warrants invalid on their face. Certainly, the better practice would have been for the issuing judge to require that the search have been reasonably contemporaneous with the delivery of the package of suitcase. Nevertheless, the fact that the warrant would on its face authorize an improper search does not undo it for all purposes. The defect is a technical one and may be disregarded since the warrants were executed at the only time practicable under the facts as set forth in the affidavits, and within the ten days provided by statute and directed by the warrant on its face. Thus, that only a technical irregularity is involved is suggested by cases holding that the fact that a warrant improperly authorized a night time search did not make illegal a day time search (People v. Varney, 32 A.D. 2d 181, . . .)".

However, the search in that case was a limited one and the warrant served a statutory purpose of being executed within a ten day limitation provided by the legislature for such execution.

In this case, the failure to direct minimization related to an order or warrant that allowed eavesdropping unannounced, secret and pervasive, for a period in excess of ten days. Noteworthy, is the fact that the subject telephonic instruments were located in a domicile or a residence.

Again *People v. Varney*, 32 A.D. 2d 181, 301 N.Y.S. 2d 330 (Supreme Court, App. Div. 2nd Dept. 1969), cited in the slip opinion of the Court below at page 339 it cannot be support for the position of the Court below. In that case a search warrant granted by a New York State Court, was deemed to be in violation of the State statutes requiring probable cause justifying a night time search. The search pursuant to the warrant was actually conducted in the day time. The Court held that the warrant may have been technically deficient but that the search itself was valid.

Again, that case dealt with a search warrant that could only be executed once, and was not as pervasive in its execution as wire tapping is. Furthermore, the warrant was facially correct.

However, it is submitted, that while these cases may be looked at atomistically, and thereby having limited holdings, the aggregate of these cases constitute inroads into the fundamental right of privacy, and the warrant requirements of the 4th Amendment to the Federal Constitution. Thus, the reasoning adopted by some of the courts is that a search warrant may be technically deficient, but the search is thereby valid. Then that case serves as a holding for another case validating a search and seizure, where there are other "technical" deficiencies.

It is respectfully submitted that this Court's recent holding in *Giordano* invalidates the approach to searches and seizures that the Court below adopted.

Electronic surveillance deals with utterances, talk, speech and communication. The requirement that a warrant direct minimization, would seem to be in keeping with the 4th Amendment demand that if privacy is to be punctured, the

intrusion be limited. But since communication is involved, the 1st Amendment's freedom relating to speech also is a value to be considered. The congressional direction as to minimization is a furtherance of a 1st Amendment interest. Directives and regulations are necessary when speech is involved. Whatever government interest lies in impinging on speech, there must be narrow regulations. Consequently, these regulations are not mere talismans or platitudes. See *Procunier etc., v. Martinez.* U.S. Supreme Court, April 29, 1974, No. 72-1465, 42 U.S. Law Week, 4206, 4611, 4612.

See also VIII Suffolk University Law Review 60 (1973)

"Notes Minimization: In Search of Standards:"

In pages 78 and 79 thereof, in considering the rule as to suppression where this is a facially deficient wire tap order, it is stated in part as follows:

> ". . . Such a defect could be, for example, an insufficient degree of particularity. As previously noted, this would preclude effective 'minimization' by the monitoring office because of the lack of effective guidelines as to what may be lawfully intercepted. Such a surveillance would constitute, in effect a 'general search' and therefore, being unlawful abonitio would require suppression of all interceptions made pursuant to the order."

In *U.S. v. Kahn.* ——U.S.——, 39 L. Ed. 2d 225 (1974), the opinion of the Court held that anyone's voice over the tapped telephone is subject to seizure and interception. That the order or warrant need not name the subjects. Since this is not the law.

it is suggested that the order for authorization be precise and be promulgated in exact conformity to the enabling legislation of Congress and of this case the State legislature.

B. The Court below should have directed that an evidentiary hearing be had in the trial court to determine whether the authorities minimized properly:

The Trial Court made the decision that the authorities minimize. But the finding was made upon a consideration of the affidavits submitted by the prosecution. There was no evidentiary hearing conducted.

Initially, petitioners' counsel made an application to suppress the evidence by the serving and filing of a Notice of Motion and an affidavit underlying the Notice of Motion (302-336). Three opposing affidavits were submitted by the government. They were verified June 11, 1973, which was the day before the motion came on to be heard, and were served the day the motion came on to be heard (366-368).

The first affidavit was executed by the United States Attorney Guy L. Heineman and was verified June 11, 1973. That affidavit was to the effect that he was concerned with this investigation (340, 341). One Martin H. Hershey, an Assistant District Attorney of Kings County alleged in his affidavit that before the granting of the first wire tap warrant and thereafter, he cautioned the police to minimize all telephone conversations not pertinent to the crime under investigation (342, 343). Hershey further alleged that a police sergeant named Olesk told him that he explained the procedure of minimization to "all police officers concerned" Hershey "periodically" checked with Olesk and was told by him that minimization was carried out (343).

Hershey concluded that the reasons he gave the directions as to the minimization was that he was aware that the law required it (343).

A U.S. agent, one Alexander Dovetko, alleged in his affidavit that he was cooperating with the state authorities who were investigating this case (344, 345). Prior to applying for the first wire tap order or warrant, the U.S. attorney called this agent's attention to minimization (345). The agent visited the 'plant' daily including weekends and saw the authorities actually minimize the surveillance (345, 346).

Dovetko further averred that he reviewed the logs and summarized them as follows: 496 calls were received; of these 120 were completed calls. Then 237 calls were listened to completely. 93 were listened to "initially" and then turned off. The logs indicated frequent occasions when non-relevant conversations were not "intercepted". Thus, calls of Cirillo's children were not monitored unless they were receiving messages for Cirillo (346).

Continuing further in his affidavit, Dovetko alleged that two agents reviewed the logs as to Cirillo and calls to a co-defendant named Sorrentino. Their analysis showed that 1,496 calls were made over Cirillo's telephone. 297 were incomplete leaving a balance of 1,199 conversations. Then 688 were listened to completely, the agents "believing" that they were pertinent; 511 calls initially were listened to to determine whether they were relevant or not. In some instances, some of these were re-listened to to determine whether the conversations "continued to be non-pertinent" (347).

In regard to a co-defendant Sorrentino, 2,180 telephone calls

were made. Of these 599 were incomplete leaving a balance of 1,505 calls; of these 838 were listened to completely "because they were believed to be pertinent at the time" (347). 747 were initially listened to but the listening was discontinued (348).

18 U.S.C. 2518(A)(8) provides in part that:

> ". . . The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as it will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order of extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his direction. Custody of the recordings shall be wherever the judge orders . . ."

In this case, petitioners made a timely claim that this direction was not adhered to but the Court below found it was not mandatory (351, 352). Therefore the execution of these warrants for the period of time involved was in effect unsupervised by any judicial authority.

The aforementioned affidavits submitted in opposition claim minimization was actually conducted. But it is submitted these are the conclusions of two prosecutors and the federal agent. While a quantitative breakdown was attempted in the agent's affidavit as aforesaid, at pages 346-347 of the Appendix submitted in the Court below, these allegations are not clear and the explanation of minimization is ambiguous. Thus the agent alleged that:

> "The logs themselves indicate frequent instances where non-pertinent conversations were not intercepted . . ." (346)

Just what percentage of these calls were deemed by the agent (there was no judicial finding) to be frequent was not stated by the agent. Here again, there is no judicial supervision and instead the privacy of persons subjected to the interception is left to a police officer.

Thus, it was shown above and it is found on pages 347 of the appendix filed in the Court below, that the agent claimed that of 1199 calls 688 were intercepted but that such interception may not have been within the scope of the statute. Petitioners can't say within the scope of the warrant because there was no direction to minimize. The agent did not state that these calls were within the permissible scope because the agent alleged that of the 688 calls that were listened to completely the agents and officers "having believed at the time that the conversations were pertinent".

However the time of the interception was not the time of the hearing. What was believed at the time of the hearing was not stated in the agent's affidavit. As a matter of fact the agent's statement is an admission which supports an inference and a very strong inference that the agents may have been mistaken when they initially listened to the subject conversations in regard to whether they were relevant or not.

There is a further admission by the agents that in some instances they relistened to conversations periodically to determine that the conversations continued to be non-pertinent.

Obviously petitioners or their counsel were in no position to rebut the conclusions alleged in the opposing affidavits submitted by two prosecutors and a federal agent. An evidentary and adversary hearing would have enabled this Court to have the

complete record of just how the minimization was conducted. Obviously petitioners can not make a factual showing because of the secrecy of the investigation and hence they could not raise an issue purely by affidavit. Even in a civil action where monetary damages are at stake in distinction to a criminal action where liberty is at stake, a motion for summary judgment need not be granted where the opposing affidavit can not allege facts showing that there is a triable issue; see Rule 56(f) of the Rules of Civil Procedure for the District Courts.

Furthermore, it would seem that the warrant stands or falls as it exists and can not be corrected by state officials submitting affidavits executed subsequent to the issuance of the warrant and after it was executed. See *Whitely v. Warden of Wyoming Penitentary*, 401 U.S. 560 (1971) footnote 8 at page 565. As was stated in *Johnson v. United States*, 333 U.S. 10, (1948), at page 14:

> ". . . It's protection consists in requiring that these inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enteprise of ferreting out crime . . ."

As was stated in *U.S. v. Huss*, 482 F. 2d 38, (Cir.-2d, 1973), at page 50:

> ". . . but we can not rely solely on the government's 'good faith' representation on such a critically contested issue. Indeed, the government's good faith did not present a legal wire tapping here, nor did the government's good faith prevent it from searching illegally, or from the rating and account of the circumstances of that search which the court found to be incredible . . ."

". . . speculation at this point only weights against the government's plea that its claim be taken at face value. This 'trust us to do the right thing' argument was roundly rejected by the Supreme Court in U.S. v. U.S. Court, supra. . . ."

"The teaching of the Supreme Court in Alderman v. United States, can not be avoided. We are instructed that when illegal electronic surveillance has come to light it is the adversary system, not representations by the government and not in camera decisions by the Court, which must be relied upon to determine whether overheard matter is 'relevant' to the taint hearing. Here, the logs represent a monitor's summary of the intercepted conversation. . . ."

It was thus noted by that Court especially in footnote 8, that *Alderman v. United States,* 394 U.S. 165 required an adversary proceeding or a full evidentary hearing so that a Court can determine factual issues especially where the factual issues are complex.

It is respectfully submitted furthermore, that the logs furnished to petitioners' counsel would serve as a basis for the cross examination of the government agent and other authorities if an adversary hearing were afforded the petitioners. That would be chief sanction of the furnishing. This was frustrated because the Court had no evidentiary hearing.

In *U.S. Bynum,* 475 F. 2d 832, (Cir.-2d, 1973), counsel for the defendants there made no application for an evidentary hearing to test whether the authorities minimized the execution of wire tap orders. Nevertheless the Court below remanded the matter

for an evidentary hearing. There was an indication in that opinion, therefore, that counsel for the defendants there did less than counsel for the petitioners here. Yet, the Court below decided this issue adversely to the petitioners.

Furthermore, it is very difficult to see just why if the authorities knew of the mandatory direction that the warrant or order contained a minimization provision, the authorities did not see to it that the order under review contained such provision. Even if the order did not contain such provision, originally, certainly it would have been of no moment for the authorities to call the attention of the Court that granted such order and have the direction supplied.

C. Wire tapping is unconstitutional and violative of the fundamental right of privacy under the 4th, 5th, 9th and 14th Amendments to the Federal Constitution either as applied to the facts of this case, or on the face of such statutes:

As Mr. Justice Douglas stated in his dissent, found in *Hudson v. United States*, 402 U.S. 965:

> "I dissent from the doctrine that an individual begins to lose his constitutional rights the minute he answers the telephone."

As Mr. Justice Douglas further said in his concurring opinion in *Gelbard v. U.S.*, 408 U.S. 41, (1972) at page 62:

> "I would hold that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 offends the Fourth Amendment, as does all wire tapping and bugging, for reasons which I have often expressed elsewhere . . ."

Furthermore, in the opinion of Mr. Justice Brennan in that case, at page 45 footnote 5, it was specifically noted that the petitioners there did not raise the constitutionality of the statute.

In *Kahn v. U.S.*, — U.S. —, (1974), 39 L. Ed., 2d 225, the prevailing opinion held that anyones voice over the tapped telephone is subject of interception. But that opinion specifically noted that the constitutionality of the wire tapping statutes was not presented to the Court, at page 234.

However, it was also noted on page 234 that:

> ". . . to be sure, Congress was concerned with protecting individual privacy when it enacted this statute. But it is also clear that Congress intended to authorize electronic surveillance as a crime against the operations of organized crime. There is, of course, some tension between these two stated Congressional objectives . . ."

The Court below in its holdings found in *U.S. v. Tortorello*, 480 F. 2d 765, (Cir.-2d, 1973), recognized at pages 774-775 that there was possible tension between wire tapping as practiced under the statutes, and this Court's holding in *Osborne v. United States*, 385 U.S. 323.

While it must be recognized that the wire tap legislation under consideration, was a legislative (both federal and state) response to the demands this Court articulated in *Berger v. New York*, 388 U.S. 41, (1967); *Katz v. United States*, 389 U.S. 347 (1967); *Osborne v. United States*, 385 U.S. 323, (1966), it is respectfully submitted that in practice these demands cannot be met. This perhaps is in the nature of this type of surveillance and investigation. It is intangible, it does not require prior notice of

purpose and authority, it permits the seizure of words which are symbolic of ideas, it may have a "chilling" effect on people who are not criminals, but nevertheless desire to have the privacy of their conversation and communication of ideas or anything else people may want to communicate, untrammeled.

Thus, while a search warrant is primarily directed to the search and seizure of tangible property, search warrants also are limited to one execution within a given period, usually ten days.

Wire tap warrants can extend for thirty day periods, twenty-four hours a day and can apply to all who use the telephone. See *U.S. v. Kahn, supra.* Moreover, what is usually spoken over the telephone is subject to a "interpretation" by the police who claim that the words have a secondary meaning relating to the crime under investigation.

That wire tapping reaches the right of privacy in regard to free expression and even assembly, see *U.S. v. White,* 401 U.S. 745, (1971), dissenting opinion of Mr. Justice Douglas, at page 756, 762, 763, 764-766.

This Court held that the 9th Amendment to the Federal Constitution is grounded on privacy, *Griswold v. Connecticut,* 381 U.S. 479, (1965), page 484. See also concurring opinion of Mr. Justice Goldberg, with whom the Chief Justice and Mr. Justice Brennan joined, at page 488, 489.

See also *Roe v. Wade,* 410 U.S. 113, (153). While that case considered the due process clause of the 14th Amenement to the Federal Constitution as involving the right of privacy, it is submitted that such right can either be found in the due process provisions of the Bill of Rights or in the 9th Amendment to the Federal Constitution.

It is respectfully submitted that the 9th Amendment to the Federal Constitution is not just a catch-all provision, but has a definite meaning fixed in history.

> "Under the Ninth Amendment What Rights Are the 'Others Retained By The people?' 29 Federal Bar Journal, Summer 1970, No. 3, pages 219, et seq.

It is respectfully submitted that the rights retained by the People as articulated in the 9th Amendment is the right of privacy and the right to be free from eavesdropping. See "Under the Ninth Amendment, . . . , 14 South Dakota Law Review, 80 et seq., (Winter 1969)." On page 86 of that article it is noted that the 9th Amendment has been argued as being relevant to wire tapping or electronic surveillance. On pages 89-90, it is noted that the 9th Amendment envisaged certain basic rights whether the same are enumerated or otherwise. It is submitted these include the basic rights at common law.

At common law, eavesdropping was considered a nuisance. It was actionable. As was stated in *In Re Lanza*, 6 Misc. 2d 411, 163 N.Y.S. 2d, 576, at pages 579-580 where it was stated:

> "If we are to enjoy the benefits of a free society, we must have guaranteed to us the right of freedom of thought and speech. Freedom of speech, of necessity includes the right to be free from unwarranted secret listening of interference by others. The privacy of all free citizens is a fundamental and basic right. Without resorting to antiquity, we find in the Magna Carta a guarantee of security to all the men in that famous clause (39) that 'no freeman shall be taken, or imprisoned or disseised, or outlawed or banished, or anyways molested, nor will we pass upon

him, nor will we send upon him, unless the lawful judgment of his peers, or by the law of the land.' Blackstone in his Commentarys . . . defining the offense of eavesdropping, says: 'eaves-droppers, or such as listen under walls or windows or the eaves of a house to harken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance.' Corpus Juris Secundum says that in English Criminal Law eavesdropping was 'the offense of listening in on the walls or windows, or the eaves of a house, to harken after discourse, and thereupon to frame slanderous and mischievous tales.' . . . Bishop says that eavesdropping 'consists of a nuisance of hanging about the dwelling house of another, hearing tattle, and repeating it, to the disturbance of the neighborhood. . . ."

Volume XIV, Words and Phrases, Eavesdropping, p. 111, defines an eavesdropper as 'one who is secretly a listener to conversations between others, and would include a person who merely overheard communications or conversations between a husband and wife' . . . Eavesdropping was an indictable offense in common law . . ."

See also *In Re Lanza*, 4 A.D. 2d 252, 164 N.Y.S. 2d 534.

CONCLUSION:

It is respectfully submitted that the petition for the writ of certiorari be granted.

Respectfully submitted,

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